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NOT TO BE PUBLISHED

COURT OF APPEAL, FOURTH DISTRICT

DIVISION TWO

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. RUBEN GUERENA VERDUGO, Defendant and Appellant.	E028439 (Super.Ct.No. FSB023796) OPINION

APPEAL from the Superior Court of San Bernardino County. Michael M. Dest, Judge. Affirmed.

Rebecca P. Jones, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Peter Quon, Jr., Supervising Deputy Attorney General, and Pat Zaharopoulos, Deputy Attorney General, for Plaintiff and Respondent.

A jury convicted Ruben Guerena Verdugo of second degree commercial burglary

(Pen. Code,[1] § 459) and petty theft with a theft prior (§ 666). In bifurcated proceedings, the trial court found true allegations that Verdugo had suffered two strike priors. (§ 667, subds. (b)-(i).) He was sentenced to prison for 25 years to life and appeals, claiming his request for a *Marsden*[2] hearing was improperly denied, the prosecutor committed prejudicial misconduct, and the jury was misinstructed. We reject his contentions and affirm. The facts surrounding these offenses are irrelevant to the appeal.

ISSUES AND DISCUSSION

1. *Verdugo's Request for a Marsden Hearing*

On January 10, 2000, the jury returned its verdicts and on January 20, 2000, the trial court found true the allegations that Verdugo had suffered two strike priors. Sentencing was scheduled for February 25, 2000, but was continued to March 31 at Verdugo's request. On March 1, 2000, the trial court received a letter from Verdugo, which stated, "I would like an appeal on [*sic*] my trial. . . . My [c]ounsel is [i]nad[e]qu[ate] and [i]ncomp[et]ent. He [f]ailed to motion my [c]ase [u]pon my request. It's stated in my [c]ounsel's [f]ile a request [f]or a Mardsen hearing, which he pled with me not to do so. He assured me . . . [h]e would work to my satisfaction. But[,] instead, not only did he fail, [b]ut he wouldn't address the [c]ourt in my behalf. I informed him . . . I would do it myself. He [s]tated I [c]annot without [c]ounsel's approval." He went on to assert that his attorney would not speak to Verdugo's family and "shows very little interest in my case . . . ." He went on to allege that his

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

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attorney did not tell him that he had "a[n] option to take the stand. . . ." He complained that his attorney "never argued for my defense," did not try to discredit a prosecution witness with the latter's record and "never argued on the issue of my prison priors being brought out before the jury." He claimed that despite a pretrial agreement not to use the word "commercial" during trial, it was used, but he did not say by whom. He also asserted that a similar agreement had been reached about not using the words "strike" or "life," but he did not say whether this understanding had been breached. He concluded, "[T]heres [*sic*] much more defaults in my case[, b]ut I feel with such supplemental evidence that this request of a retrial be [f]iled with . . . the [c]ourt and orally recorded at [the] next . . . hearing . . . that defendant by his [c]ounsel will request a retrial [d]ue to violation of my [c]onstitutional rights[.] [W]ith [the c]ourt's permission this retrial [will] be heard on date and time by the trial [c]ourt."

On March 16, 2000, the trial court wrote, upon a document entitled "Request for Further Action" referencing the letter, "No action needed at this time." On March 24, 2000, Verdugo filed a substitution of attorney, replacing his public defender with retained counsel. On March 31, May 9 and September 26, which were his next three appearance dates, Verdugo's motions for continuances were granted.

Verdugo then moved for a new trial, based on incompetence of trial counsel. In a declaration attached to the motion, Verdugo asserted that his discussions with his trial attorney had been inadequate and that, until he was called to the stand, he had not been

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[2] *People v. Marsden* (1970) 2 Cal.3d 118.

informed both that he didn't have to testify and that he was going to testify. He also complained that he had not been told in advance that his wife would be called to testify and that his attorney had not prepared her to be a witness. He reiterated his earlier assertion that his attorney had talked him out of bringing a *Marsden* motion, although he did not contend that counsel told him that he could not bring such a motion without the latter's consent.

During the hearing on the motion for a new trial, Verdugo testified that a defense investigator visited him once before trial for an hour. He conceded that he discussed his case with his attorney four times after the preliminary hearing for "[n]othing over 20 minutes." He said they never discussed possible defenses nor the witnesses against him. However, he conceded that his parole officer had sent him copies of the police reports, and, therefore, he knew what the witnesses were going to say about him. He also admitted that he discussed the reports with the defense investigator. He denied having discussed with his attorney the decision that he should testify or knowing that he did not have to testify. He said he did not discuss his testimony with his attorney before he took the stand and had not been told that he would testify until five minutes before. He said that although the trial judge had told him not to disclose to the jury that this was a three strikes case, his attorney questioned him on the stand about his criminal background. He also asserted that his attorney had not discussed with him calling Verdugo's wife as a witness for the defense. He admitted that long before his case went to trial, "jail house lawyers" had explained to him how to make a *Marsden* motion, but he thought he could address the court only through his attorney. He said his attorney should have argued that one of the prosecution witnesses

should not be believed because he had a prior record, ignoring the fact that he himself testified and had a prior record. He admitted he would not have been unhappy with his attorney's representation of him had he been acquitted.

Verdugo's wife testified that defense counsel called her and told her she was to testify in two hours. No one discussed with her her anticipated testimony. She said that she was angry with her husband for being in jail and said that she was angry in the presence of the jury.

The trial court noted a portion of the reporter's transcript which reflected that, before the jury had been brought into the courtroom, defense counsel, in Verdugo's presence, and with his participation,[3] said that Verdugo's wife would be called as a witness.[4] The court denied the motion for a new trial, saying, "The [c]ourt, in one of its roles, is to ascertain the demeanor . . . and the credibility of witnesses. And the [c]ourt watched [Verdugo and his wife] . . . and evaluated their demeanor, the manner of testimony, how they answered questions, whether they answered questions directly or whether they went on to tangents, their tone of voice, their manner and looking, arm gestures, looking at counsel or not looking at counsel. And the [c]ourt is not convinced that . . . Verdugo has total credibility as to all the issues that he raises. [¶] . . . [H]e was being advised by pro[.] pers[.]

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[3] Verdugo spelled for the court his wife's name and provided her birth date.

[4] Verdugo here contends that the portion of the record cited does not contradict him, but it does. He asserted in his declaration in support of the new trial motion that he had not been informed that his wife was going to be called as a witness. He further testified at the hearing on the motion that he had not discussed this with his attorney.

and other people in the jail about . . . *Marsden* [motions], but never raised it to the [c]ourt. If it's not raised to the [c]ourt, the [c]ourt can't do anything. [¶] . . . [¶] . . . It appears that [his trial counsel] had been ready. [His trial counsel] was very qualified, in that he had personally conducted the preliminary hearing in this case. He had knowledge of the case all the way through. . . . He spoke to the defendant at least four times after the preliminary hearing. [¶] In addition to that, he sent his investigator . . . to talk to . . . Verdugo. He had . . . Verdugo only consult with the investigator after . . . Verdugo had the police reports. [¶] . . . [¶] . . . [C]ounsel indicated he was ready. . . . He has . . . practiced 27 years,[5] had an investigator on this case, had the reports read, the preliminary hearing, consulted with his client."

Verdugo here contends that his letter to the trial judge constituted a request for a *Marsden* hearing which the court erroneously failed to provide him. We disagree.

A *Marsden* motion is a request by the defendant that his appointed counsel be discharged or that new counsel be substituted in. (*People v. Marsden, supra,* 2 Cal.3d 118.) What is required is "at least some clear indication by defendant that he wants [counsel discharged or] a substitute attorney." (*People v. Lucky* (1988) 45 Cal.3d 259, 281, fn. 8.) Verdugo's letter comprises a list of complaints about matters that had already taken place. The proper vehicle for such complaints is a writ of habeas corpus for incompetency of trial counsel or an appeal alleging the same. His letter expressly asks for

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5 Contrary to Verdugo's contention, citing trial counsel's experience as a lawyer was not tantamount to denying a *Marsden* motion based on the trial court's observations of

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a new trial and an appeal, not for substitution of counsel. Nothing in it suggests that the relationship between Verdugo and his attorney had so broken down that counsel could not competently represent him at proceedings following the verdicts and true findings or that counsel representation at those proceedings would be inadequate. (See *People v. Barnett* (1998) 17 Cal.4th 1044, 1085.)

Even if the letter could be construed as a request for a *Marsden* hearing, the trial court's only obligation is to give the defendant an opportunity to be heard about his reasons for requesting a new attorney. (*People v. Mendoza* (2000) 24 Cal.4th 130, 156-157.) Both in the letter and, certainly, in his motion for a new trial and at the hearing on same, Verdugo was given a full opportunity to air his grievances against his trial counsel. Therefore, the trial court fulfilled its obligation to him. We note with interest that not once in the new trial motion or at the hearing of it did Verdugo contend that he went out and hired an attorney because the trial court determined on March 16 not to take any action at that time on his letter. The bottom line is that Verdugo got exactly what he now says he was asking for, i.e., a new attorney to represent him at the proceedings following the verdicts and true findings.[6]

Finally, this is one of those extremely rare situations wherein we are able to say with

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counsel in other cases.

[6] This is not the proper vehicle for Verdugo's allegation that his retained attorney was also incompetent for failing, in his motion for a new trial, to reallege all the complaints Verdugo had made in the letter. Moreover, the trial court's finding that Verdugo lacked credibility strongly suggests that any contention retained counsel may have made to the trial

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great certainty that the failure to hold a *Marsden* hearing, even if required, was not prejudicial. It is clear from the trial court's remarks when denying Verdugo's motion for a new trial that it would not have been receptive to the same allegations made at a *Marsden* hearing, where defense counsel would have had the opportunity to "defend himself."

2. *Prosecutorial Misconduct*

To support the element of the charged offense of petty theft with a theft prior, the People introduced evidence that Verdugo had been convicted of and sent to prison twice for burglary. During direct examination of Verdugo by his attorney, he methodically recounted his life of crime and drug addiction, including the facts that he had been arrested about 75 times, had been convicted of several offenses, all of which he admitted, and had violated parole. During argument, defense counsel revealed his reasons for eliciting this testimony by saying, "[I]n this particular case, [Verdugo] is accused of burglarizing somebody . . . in his own neighborhood. . . . [W]hen [Verdugo] admitted his prior offenses, he didn't go to his own neighborhood. He went to another neighborhood." He also argued that the witnesses incorrectly identified Verdugo as the perpetrator because they understandably wanted Verdugo locked up due to his prior record. He contended that Verdugo ran from the police when confronted by them because there was a warrant for his arrest for a parole violation and he knew he would be jailed immediately upon apprehension. Finally, he argued that Verdugo admitted his prior offenses, rather than go to trial, because he was guilty of them; however, he went to trial on the instant offenses because he was not guilty.

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court would have been rejected.

In argument to the jury, the prosecutor asserted that the only issue was who committed the crimes. He said, "The man who did it is . . . Verdugo. The evidence points to him. It points to that one man, to . . . Verdugo, the defendant, a twice-convicted burglar. [¶] . . . [¶] . . . [T]he only question is who, and the only true, correct . . . and right answer is the defendant, . . . Verdugo, a person [who], as you heard, was arrested 75 times, convicted three times over for felonies, twice for burglary, two separate occasions went to prison." Defense counsel did not object to these remarks. Verdugo now contends that they constituted prosecutorial misconduct. Verdugo's failure to object to them waives his claim of prosecutorial misconduct. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1125-1126.) Moreover, we agree with the People that in light of all the evidence introduced at trial, especially by the defense, about Verdugo's criminal record, and the instructions to the jury that it was to consider this evidence only to assess Verdugo's credibility as a witness, the brief remarks could not have possibly harmed him. (See *People v. Milner* (1988) 45 Cal.3d 227, 245.) For this reason, also, we reject Verdugo's contention that his trial counsel was incompetent for failing to object to the remarks. (See *Strickland v. Washington* (1984) 466 U.S. 668, 687.)

3. *CALJIC No. 17.41.1*[7]

In an often repeated argument, Verdugo contends that CALJIC No. 17.41.1 invades

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[7] As the parties correctly note, the propriety of CALJIC No. 17.41.4 is currently pending before the California Supreme Court. (*People v. Engelman* (2000) 77 Cal.App.4th 1297, review granted Apr. 26, 2000, S086462; *People v. Taylor* (2000) 80 Cal.App.4th 804, review granted August 23, 2000, S088909.)

the privacy and secrecy of jury deliberations, coerces hold-out jurors and infringes on the power of jury nullification. We disagree. That instruction provides: "The integrity of a trial requires that jurors, at all times during their deliberations, conduct themselves as required by these instructions. Accordingly, should it occur that any juror refuses to deliberate or expresses an intention to disregard the law or to decide the case based on [penalty or punishment, or] any [other] improper basis, it is the obligation of the other jurors to immediately advise the Court of the situation." (CALJIC No. 17.41.1 (1998 new)(6th ed. 1996).)

The instruction requires the jury only to report matters that clearly constitute juror misconduct, for which dismissal is appropriate. (Pen. Code, § 1089; *People v. Thomas* (1994) 26 Cal.App.4th 1328, 1333; *People v. Daniels* (1991) 52 Cal.3d 815, 864; *People v. Collins* (1976) 17 Cal.3d 687, 696.)

As the California Supreme Court recently held, "Evidence Code section 1150, while rendering evidence of the jurors' mental processes inadmissible, expressly permits, in the context of an inquiry into the validity of a verdict, the introduction of evidence of 'statements made . . . within . . . the jury room.' . . . [S]tatements made by jurors during deliberations are admissible under Evidence Code section 1150 when 'the very making of the statement sought to be admitted would itself constitute misconduct.' [Citation.]" (*People v. Cleveland* (2001) 25 Cal.4th 466, 484.) This is what the instruction is aimed at—the reporting to the trial court statements made by a juror to the effect that he or she will not follow the law. The instruction does not require the jurors to report any matter that the law views as confidential. It merely prohibits conduct which other instructions, which

Verdugo does not challenge, outlaw. As to the jury's power to nullify, we refer Verdugo to the California Supreme Court's recent statement in *People v. Williams* (2001) 25 Cal.4th 441.

Finally, the record discloses that no misconduct was reported to the trial court, no jury deadlock occurred, and there were no hold-out jurors. Therefore, we cannot agree with Verdugo that even if the instruction were defective, it affected his verdict. (See *People v. Molina* (2000) 82 Cal.App.4th 1329, 1335-1336.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED

RAMIREZ
P. J.

We concur:

HOLLENHORST
J.

McKINSTER
J.